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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

CHARLES E. MITCHELL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

WILLIAM WALLACE,
Counsel for Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

This petition of the Commissioner of Internal Revenue for a writ of Certiorari is a cross-petition to the petition (No. 307) of respondent, Charles E. Mitchell, now before this Court.

The Commissioner seeks a review of the ruling of the Circuit Court of Appeals (R. 819-828) that respondent's acquittal on a criminal prosecution on the charge of fraudulently attempting to evade taxation bars the Commissioner from later assessing under Section 293 (a) of the Revenue Act of 1928, a 50 per cent addition to the tax deficiency by reason of "fraud with intent to evade tax". He urges that Section 293 (b) of the Revenue Act of 1928 is not criminal

or punitive in nature and that the 50 per cent "additional tax" as for fraud may be assessed against respondent even though a jury in a criminal prosecution had found respondent not guilty of fraud with intent to evade tax in the very transactions upon which this additional assessment was based.

Reasons for Denying the Writ.

I.

Petitioner urges that the constitutional principles announced by this Court in *United States* v. *La Franca,* 282 U. S. 568; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386; *Lipke* v. *Lederer,* 259 U. S. 557; and *Coffey* v. *United States,* 116 U. S. 427, either have no application to this case or should be overruled if constituting a bar to the assessment of penalties against respondent. Respondent insists that these contentions are without merit.

It is well settled that the assessment of a penalty because of a fraudulent attempt to evade tax is punitive, and that a person cannot be so assessed as a penalty for certain acts if he has previously been in jeopardy in a criminal prosecution based on the same acts.

Coffey v. *United States,* 116 U. S. 427, is a leading case upholding this statement of the law. For a detailed discussion of this case, reference is made to respondent's petition for a writ of certiorari (No. 307) and supporting brief now before this Court. This case announces as a fundamental principle of our constitutional law that a person, once in jeopardy on a criminal prosecution, may not later, in another proceeding, whether criminal or civil, be punished for the acts of which he was previously acquitted or convicted.

In *United States* v. *La Franca,* 282 U. S. 568, the respondent had been convicted of violating the National Prohibition Act. In addition to the penalty thereby imposed on him,

he was assessed, under Section 35 of the Act, with a tax in double the amount provided by law. In ruling against the additional penalty, this Court clearly distinguished between a "tax" and a "penalty" as follows (p. 572):

> "A tax is an enforced contribution to provide for the support of Government; a penalty as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or thing; and if an exaction be clearly a penalty, it cannot be converted into a tax by the simple expedient of calling it such."

Before deciding that the respondent had previously been in jeopardy and could not again be punished for the same offence, this Court propounded the following question (p. 573), which, in view of the negative answer given and the aforesaid distinction between a "tax" and a "penalty", gives the rationale of the case and is decisive of the instant case:

> "Respondent already had been convicted and punished in a criminal prosecution for the identical transaction set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action under the circumstances here disclosed, alter the rule?"

This Court, in *Lipke* v. *Lederer*, 259 U. S. 557, 561-2, drew the following distinction between a tax and a penalty:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax* case, *ante*, 20. When by its very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States*, 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment

> under § 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix*, 233 U. S. 318, 324."

This distinction between a tax and a penalty is applicable to the instant case even though the *Lipke* case was a decision under the National Prohibition Act, an act designed to prohibit certain acts declared to be unlawful. In the instant case, the penalty could only have been assessed upon a determination that respondent had committed certain criminal acts—each involving a fraudulent attempt to evade tax with respect to which he had been in jeopardy on the earlier criminal trial. This "clearly involves the idea of punishment for infraction of the law."

There are certain cases apparently holding that it is unconstitutional to assess an additional tax as penalty for violation of a taxing statute in any manner other than by indictment and jury trial. *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386; *Hanby* v. *Commissioner of Internal Revenue*, 67 F. (2d) 125. However, in the instant case it matters not whether the penalty was assessed in a civil or criminal proceeding, as the assessment could only have been made if respondent had not previously been placed in jeopardy by criminal prosecution on the same issue of fact. *United States* v. *La Franca, supra.* In this connection see *United States* v. *Chouteau*, 102 U. S. 603, wherein this Court said (p. 611):

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. *The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prose-*

> *cution.* The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction my be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless." (Italics ours.)

II.

The cases relied upon by petitioner are not in point.

In support of his contention that the Circuit Court of Appeals erred in eliminating the penalties, petitioner relies upon the following cases:

McDowell v. *Heiner,* 15 F. (2d) 1015 (C. C. A. 3) (adopting the opinion of the District Court, 9 F. (2d) 120 (W. D. Pa.)), certiorari denied, 273 U. S. 759;
Murphy v. *United States,* 272 U. S. 630;
Lewis v. *Frick,* 233 U. S. 291;
Passavant v. *United States,* 148 U. S. 214;
Dorsheimer v. *United States,* 7 Wall. 166; and
Bartlett v. *Kane,* 16 How. 263.

These cases relate to the mode of procedure for the assessment of the penalty. They do not affect the doctrine of *Coffey* v. *United States,* 116 U. S. 436, and the cases referred to under Point I.

In *McDowell* v. *Heiner,* 15 F. (2d) 1015 (affirming 9 F. (2d) 120, certiorari denied, 273 U. S. 759), relied upon by petitioner, the only opinion was that written by the District Court. There the taxpayer opposed the assessment of penalties upon the ground that he had not been indicted and tried by a jury. The Court rejected this contention and

held that a penalty for an attempt to evade tax may be enforced by civil suit or by action of administrative officers, "although such facts may constitute a crime." The court also clearly stated in the following language (p. 122) that it viewed the assessment of an additional tax as a punishment for the crime of fraudulently attempting to evade tax:

> "* * * Willful fraud, with intent to evade payment, has been made a misdemeanor with appropriate punishment. But this does not limit the power of Congress to *punish* the delinquent taxpayer by increasing the amount of the tax by *ad valorem* additions." (Italics ours.)

There was no discussion in that case of *res judicata* or double jeopardy and the decision has no bearing upon the instant case except in so far as it states that the assessment of additional taxes is a means of punishing infractions of the tax laws, which coincides with respondent's contention that the assessment of tax penalties against him is an attempt to punish him for alleged criminal acts of which he has been acquitted by a jury in a criminal prosecution.

In *Dorsheimer* v. *United States*, 7 Wall. 166, this Court apparently held that penalties for tax evasion might be assessed and collected by administrative officers. However, the Court stated that the penalty was a punishment for a fraudulent act and served to deter others from committing similar acts.

In *Bartlett* v. *Kane*, 16 How. 263, this Court held that a penalty for undervaluation of goods imported into the country might be assessed by administrative officials without criminal proceedings against the alleged offender, and that the value fixed by customs appraisers was conclusive in the absence of fraud. The Court stated that such procedure was necessary in order to expedite the collection of custom duties. To the same effect is the decision of this Court in *Passavant* v. *United States*, 148 U. S. 214.

Murphy v. *United States,* 272 U. S. 630, is not in point. There, this Court sustained the power of an equity court, subsequent to defendant's acquittal of a violation of the National Prohibition Act, to abate a nuisance declared to be such by Sec. 22 of the Act. The decision was placed upon the ground that

> "the decree in the present case did not impose a punishment for the crime from which the appellants were acquitted by the former judgment. *That it did impose a punishment is the only ground on which the former judgment would be a bar.* * * * The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place." (Italics ours.)

Furthermore, the court said:

> "It appears to us that the purpose is preventive, not a second punishment that could not be inflicted after acquittal from the first."

Likewise, in *Lewis* v. *Frick,* 233 U. S. 291, in sustaining a deportation order after the defendant had been acquitted of a criminal charge, this Court concluded that "*the issue* presented by the traverse of the indictment *was not identical* with the matter determined by the Secretary of Commerce and Labor". (Italics ours.)

Conclusion.

1. The authorities relied upon by Petitioner do not sustain his contention. Rather they bear out the contention of respondent that the additional tax sought to be imposed is a penalty for an alleged fraudulent attempt to evade tax.

2. On the authority of *Coffey* v. *United States, United States* v. *La Franca,* and *United States* v. *Chouteau, supra,* petitioner is foreclosed from assessing additional taxes as

penalties against respondent by reason of respondent's acquittal in a criminal prosecution based on the identical acts on which petitioner now seeks to make the assessment. This is true even though this is a civil proceeding. *United States* v. *La Franca, supra; United States* v. *Chouteau, supra.*

3. The additional tax assessment which petitioner seeks to impose on respondent is a punishment for an alleged crime of which respondent has been acquitted and as such, violative of the Fifth Amendment. The taxing statutes should be applied and construed so as to avoid this unconstitutional result. *United States* v. *Standard Brewery,* 251 U. S. 210; *Baender* v. *Barnett,* 255 U. S. 224.

WHEREFORE it is respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM WALLACE,
Counsel for Respondent.